COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

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Case No. A.C.
2015-P-0180

TIMOTHEA NEARY-FRENCH

Appellant

v.

COMMONWEALTH OF MASSACHUSETTS

Appellee

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REPORTED QUESTION OF LAW FROM THE SOUTHERN BERKSHIRE DIVISION OF THE DISTRICT COURT DEPARTMENT PURSUANT TO MASS. R. CRIM. P. 34

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# BRIEF OF APPELLANT

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Elizabeth J. Quigley
BBO#408910
27 Henry Ave.
Pittsfield, MA 01201
413-499-5476

May 2015

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## STATEMENT OF THE ISSUE

The reported question of law is as follows:

(1) Whether the 2003 amendment to G.L. c. 90, s 24, which created a new ".08 or greater" theory by which to prove an OUI offense, where a breath test reading of .08 or greater is an element of the offense, now makes the decision by a defendant whether or not to take the breath test itself a critical stage of the criminal proceeding requiring that the defendant be advised of his/her right to counsel prior to making that decision, pursuant to art.12 of the Massachusetts Declaration of Rights and the Sixth and Fourteenth Amendments of the United States Constitution.

## STATEMENT OF THE CASE

The defendant, Timothea Neary-French was charged in Southern Berkshire District Court, Docket No: 1229CR0950, with operating under the influence-liquor or eight one-hundredths (.08%), in violation of *G.L. c. 90 § 24 (1)(a)(1)*. (R.A. 1[1] and Add. 1[2]) The date of offense was November 28, 2012. (R.A. 1) Between February 7, 2013 and May 17, 2013, Timothea Neary-French filed a motion to suppress evidence, seeking to suppress the breath test result. (R.A. 10)

Timothea Neary-French asserts that she was entitled, pursuant to art.12 of the Massachusetts Declaration of Rights and the Sixth and Fourteenth Amendments of the United States Constitution, to be advised of her right to counsel prior to a request to take a breath test. (R.A. 10 and Add. 22-24) In light of the 2003 amendment to the operating under the influence

[1] All references to R.A. refer to the Record Appendix.
[2] All references to Add. refer to the Addendum.

statute creating the ".08 or greater" (per se) theory of the prosecution for an operating under the influence offense, because she was not so advised, the breath test should be suppressed. (R.A. 51-53)

In support of this position, Timothea Neary-French states that because the 2003 amendment to the operating under the influence statute made a .08 or greater breath test result a separate and independent theory by which a violation of *G.L. c.90 § 24* could be found, as well as an element of the offense, (R.A. 51-53 and Add. 1) the decision of whether or not to take the breath test a "critical stage in the criminal process." *Commonwealth v. Brazelton*, 404 Mass. 783, 785 (1989). If the decision to take a breath test is a "critical state in the criminal process" then it's Timothea Neary-French's position that the right to be advised by counsel must attach. *id.* (R.A. 10 and 51-53) The defendant states that as a result of the amendment, the statutory safeguards identified in *Brazelton* are no longer sufficient to protect a defendant's constitutional rights and as a result, *Brazelton* is no longer good law. *id.*

## STATEMENT OF FACTS

After an evidentiary hearing regarding the defendant's motion to suppress presided over by Justice Charles W. Groce III, sitting in the Southern Berkshire District Court, he made the following findings of Fact:

1. At approximately 1:15pm, On November 28, 2012, Chief Stephen O'Brien of the Lenox Police Department was on routine patrol on Franklin Street, in the town of Lenox, Massachusetts, when he was flagged down by a woman. (R.A. 67)
2. The women reported suspicious conduct by a vehicle in the vicinity specifically that then suspect vehicle was "bumping into" another vehicle. (R.A. 67)
3. Chief O'Brien then made contact with the operator of that vehicle who was the defendant Timothea Neary-French. (R.A. 67)
4. Based on his observations of the defendant, Chief O'Brien suspected that she was operating under the influence. (R.A. 67)
5. He then called for assistance, and Officer William Colvin arrived to conduct a series of field sobriety tests with the defendant. (R.A. 67)
6. Based on his observations of the defendant, as well as her performance on the tests, Officer Colvin placed the

defendant under arrest for operating under the influence. (R.A.68)

7. Just before being placed in a cruiser for transport back to the Lenox Police Department, the defendant asked to use a phone. (R.A. 68)

8. However, she did not indicate whom she would call.

9. At approximately 1:31pm, the defendant arrived at the police department. (R.A. 68)

10. Soon after the defendant asked if she could call her husband.

11. Her request was denied. (R.A. 68)

12. At approximately 1:38pm the defendant received her Miranda rights and began the booking process. (R.A. 68)

13. At approximately 1:50pm, the defendant was advised of her OUI rights via the statutory rights and consent form. (R.A. 68)

14. Those rights include 1) her right to a doctor, 2) her right to a telephone call, pursuant to *G.L. c. 276, § 33A*, 3)the request to submit to chemical test, pursuant to *G.L. c. 90, § 24, and 4*) a notice to persons holding commercial license. (R.A. 68 and Add. 1-21)

15. At approximately 1:51pm, the defendant was specifically informed by police of her statutory right to make a phone call pursuant to *G.L. c. 276, § 33A*. (R.A. 69 and Add. 20)

16. At approximately 1:51pm, a request was also made by police that defendant submit to a breathalyzer test. (R.A. 69)

17. Defendant initially declined. (R.A. 69)

18. However, after 3-4 minutes the defendant consented to take the breath test. (R.A. 69)

19. After the appropriate observation time period has passed defendant took the breathalyzer test. (R.A. 69)

20. At approximately 2:18pm the breath test was completed. (R.A. 69)

21. The defendant's breath test results were greater than .08. (R.A. 69)

22. At 2:19pm, an officer asked the defendant if she had someone she could call to pick her up and bail her out to which she responded yes. (R.A. 69)

23. At 2:20pm, the defendant indicated that she'd want her husband to come retrieve her. (R.A. 69)

24. At 2:21pm, the defendant inquired as to whether or not she had failed her breath test. (R.A. 69)

25. At 2:34pm, the defendant asked if her Husband could be called and indicated that he would be worried about her. (R.A. 69)

26. At 2:36pm, an officer asked the defendant if she wanted to call her husband and defendant indicated that she did. (R.A. 70)

27. At 2:36pm and 2:37pm, the defendant made unsuccessful attempts to contact her husband. (R.A. 70)

28. Finally, at 2:38pm, the defendant made contact with him. (R.A. 70)

29. The defendant was allowed by police to make a phone call approximately one hour and five minutes after she arrived at the station. (R.A. 70)

## ARGUMENT

### I. The Defendant was Denied Assistance of Counsel at a Critical Stage in the Criminal Process

In Massachusetts, in order "[t]o support a prima facie case for Operating under the Influence (hereinafter "OUI"), the prosecution must prove three elements: (1) [that] the defendant was in physical operation of the vehicle; (2) [that the defendant did so] on a public way or place to which the public has a right of access; and (3) had a [measurable] blood alcohol content percentage of .08 or greater, or was impaired by the influence of intoxicating liquor. *G.L. c. 90 § 24*, See *Commonwealth v. Zeininger*, 459 Mass. 775, 778 (2011). (Add. 1)

In 2003, the Massachusetts Legislature amended *G.L. c. 90 § 24 (1)(a)(1)* with Mass. Acts c. 28, sec 1 which created two alternative theories for satisfaction of the third element of the offense: (1) "operating under the influence theory" the so

called common law theory (2) the "per se theory" which can satisfy the third element if the defendant has a blood alcohol concentration of .08 or greater. (Add. 1)

Prior to the 2003 amendment of *G.L. c. 90 § 24*, the prosecution could only satisfy the third element of the offense by establishing that defendant was "operating under the influence." (Add. 1) Under this theory, the prosecution could attempt to make a showing of impairment, by entering into evidence a chemical or blood/breath test of the defendant's blood-alcohol level (hereinafter "BAC").

A jury was then to be instructed pursuant to *G.L. c. 90 § 24 (1) (e)* that they could draw a "permissible inference" that the defendant was under the influence at the time of the offense, if the BAC was eight one-hundredths(.08) of a percentage or greater. (Add. 1)

The Massachusetts Legislature did away with the "permissible inference" language and adopted the "per se" theory, in 2003. Under the "per se" theory, a defendant with a BAC level of .08 or greater is now considered to be legally intoxicated under the law. (Add.10) BAC can be used solely to satisfy the third element of the offense without the prosecution having to prove that the defendant has a diminished capacity, thus making the BAC an element of the offense. The prosecution

can now sustain a conviction based solely on the .08 or greater BAC result.

Before the 2003 Amendment to *G.L. c. 90 § 24*, The Massachusetts Supreme Judicial Court ruled in *Commonwealth v. Brazelton*, 404 Mass. 783, (1989) that the right to counsel does not attach before the decision was made to take a breathalyzer test. (Add. 1) The Court determined that the test was not a 'critical stage' in the criminal process and the assistance of counsel would create an undue delay in the administration of the test.

According to *Brazelton*, the Legislature had enacted reasonable safeguards under *G.L. c. 276 § 33A* and *G.L. c. 263 § 5A* to protect the defendant's rights. (Add. 20 and 21) The Court determined that pursuant to *G.L. c. 276 § 33A*, the defendant had a right to a phone call within one hour after being brought to the police station and also a right to be immediately examined by a physician selected by the defendant pursuant to *G.L. c. 263 § 5A*. (Add. 20 and 21)

In 2003, The Legislature's removed the "permissible inference" language and substituted the "per se" theory language. This created a situation where the administration of the breathalyzer has become a 'critical stage' in the criminal process by making the decision to take the test tantamount to submitting evidence as to an element of the offense.

The safeguards of a phone call and inspection by an independent physician are no longer sufficient to protect the defendant's rights. In the case at bar, the defendant was not allowed to make a phone call during the allotted one (1) hour statutory period. (R.A. 70)

The defendant should be afforded an opportunity to consult with counsel prior to deciding whether or not to submit to a breath test where the breath test can be used as the sole basis of a conviction.

In this case, the defendant has testified that she made a request to reach out to her Husband. (R.A. 34 and 69) While the Court made no factual finding that she was seeking an attorney, the defendant should not have to articulate her intent as to why she wishes to speak to a third party. She has a right to remain silent under *Miranda v. Arizona*, *384 U.S. 436 (1966)*. An affirmative obligation should exist for the police to inform the defendant of her right to counsel prior to taking the breath test. No condition precedent, such as a request for counsel, should be required, because the right to counsel is a fundamental right which rises to Constitutional dimensions.

## II. Sixth Amendment of the United States Constitution and Article 12 of the Massachusetts Declaration of Rights

The Court has recognized that "[t]he right to counsel is a fundamental constitutional right." *Commonwealth v. Means*, 454

Mass. 81, 88 (2009) and "[u]nder the Sixth Amendment to the United States Constitution and art. 12 [of the Massachusetts Declaration of Rights], the defendant has a right to counsel at every 'critical stage' of the criminal process." *Commonwealth v. Woods*, 427 mass. 169, 174 (1998). (Add. 22-24)

A critical stage is one in which the defendant's rights could be sacrificed or lost. A 'critical stage' is every stage of a criminal proceeding at which the advice of counsel is necessary to insure the defendants' right to a fair trial or every stage at which the absence of counsel might impair the preparation or presentation of a defense.

The decision to take the breathalyzer completely changes trial strategies and defenses available to a defendant. It is hard to think of a more critical decision in an OUI case than a defendant's decision whether or not to take a breath test. While it is not testimonial, the breath test becomes direct evidence of the offense.

Critical stages have traditionally included custodial interrogation, line-ups, pre-trial hearings, suppression motions, jury selection, trial, and sentencing. Denial of counsel to a defendant during a critical stage is considered to be the pinnacle to an unfair trial warranting the reversal of a conviction. See Generally *U.S. v. Wade*, 388 U.S. 218 (1967).

Pursuant to the "per se" theory, the prosecution may collect evidence as to an element of the offense and side step the fundamental right to counsel. "The role of defense counsel [is] a key component of our criminal justice system, as it provides the accused with an advocate skilled in the process and trained to counter the power of the prosecution." *Godinez v. Moran*, 509 U.S. 389, 400 (1993).

The "per se" theory imposes a strict liability onto the defendant if he or she takes the breathalyzer and registers a .08 BAC or greater. The accused is considered legally impaired. The Defendant should be afforded an opportunity to consult with counsel before being administered a breath test to determine if the defendant should submit to the gathering of such evidence. Only in an OUI case can someone be convicted of a crime based solely on the result of a machine.

The option to refuse a breath test affords the defendant greater defenses and strategies at trial as it allows the defendant to avoid the "per se" theory of criminal liability.

It is critical that the defendant has "[t]he right to counsel...includ[ing] assistance in making decisions about specific defenses and trial strategies, which may rise to the level of [a] 'critical stage' of the process." Commonwealth v. *Rabb*, 70 Mass. App. Ct. 194, 198 (2007).

The Court has been clear that "[t]he deprivation of the right to counsel during a critical stage of the criminal process is [omitted] an error "that so infringes on a defendant's right to the basic components of a fair trial that it can never be considered harmless." See *Commonwealth v. Johnson*, 80 Mass. App. Ct. 505, 511 (2011) citing *Commonwealth v. Godwin*, 60 Mass. App. Ct. 605, 609 (2004).

## III. Fourteenth Amendment and Due Process

The defendant further argues that she was not afforded sufficient due process under The Fourteenth Amendment of the United States Constitution. The Court looks to the following factors to determine whether sufficient process was afforded: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

In determining whether due process was sufficient, the Court will balance the following four factors:

(1) Private Interests. The defendant's interest is to be advised of her right to access counsel before submitting to take a breath test and potentially avoid subjecting herself to criminal liability under the "per se" theory.

(2) Risk of Erroneous Deprivation. The Defendant argues the "per se" language has created a critical stage in the process in which the prosecution can submit direct evidence of an element of the offense.

The defendant can no longer adequately protect her interests and should be allowed to reach out to counsel and explore liability options.

The safeguards outlined in *Brazelton* (See *G.L. c. 276 § 33A* and *G.L. c. 263 § 5A*) are no longer sufficient to protect the defendants interests. (Add. 20 and 21) In this case, the defendant was not allowed to make a phone call within the one (1) hour statutory period which restricted her ability to make an informed decision to take the breathalyzer. (R.A. 70)

The "per se" theory has created a situation in which the defendant should be afforded due process by initiating her right to counsel to guide her through this critical stage, even if access to counsel is limited.

(3) Governmental Burden and Additional Procedures

The Defendant argues that the governmental burden of having an officer advise her of a right to contact and speak with

counsel would have no impact on causing an undue delay on taking a breath test.

This brief intrusion into this process would give the defendant the adequate information necessary to make an informed decision on whether or not to take the breath test.

It is a well understood that counsel might not always be available during the time period necessary for the defendant to take the breath test. The defendant proposes that a discussion with counsel, if available would allow her to evaluate the repercussions of taking the breath test with its monumental implications to the case.

If counsel is not able to be reached, the defendant would have at least been advised of her right and then could decide whether or not to take the test.

The defendant's interest to due process far outweighs the governmental interest in performing a speedy breath test. The breath machine results do not always produce reliable results. The defendant should be informed of the legal ramification of taking the breath test and all factors associated with the reliability of the machine, before being required to do so.

## IV. Other Jurisdictional Interpretations

In Massachusetts, the Court had determined in *Brazelton* that the right to counsel does not attach, because it is a non-

critical stage in the criminal process. *id.* The rational for this 1989 decision rests on the fact the Commonwealth had to still prove impairment under the "common law" theory.

Courts in other jurisdictions have held different views. Some courts have decided that a right to counsel before electing to take a breathalyzer or blood alcohol content test exists as a matter of State statutory law. See *Copelin v. Alaska*, 659 P.2d 1206, 1211-1212 (Alaska 1983) (breathalyzer); *Kuntz v. State Highway Comm'r*, 405 N.W.2d, 285, 288 (N.D. 1987). (blood alcohol content) See *Brazelton* at 784.

Other jurisdictions have held that the breathalyzer is now a critical stage in the proceeding and the defendant is entitled to a limited assistance of counsel. See *Prideaux v. State Dept. of Public Safety*, 247 N.W.2d 385 (1976).

One jurisdiction has found a state constitutional right to counsel in the circumstances. See *State v. Spencer*, 305 Or. 59, 74 (1988) (breathalyzer) See *Brazelton* at 784.

Other courts have held that the Sixth and Fourteenth Amendments to the United States Constitution guarantee one the right to counsel before deciding to submit to a breathalyzer or blood alcohol content test. See *Heles v. South Dakota*, 530 F.Supp. 646, 652 (D.S.D.) (breathalyzer); *People v. Gursey*, 22 N.Y.2d 224, 227-228 (1968) (breathalyzer); *Forte v. State*, 686 S.W.2d 744, 754 (Tex. App. 1985) (blood alcohol content); *State*

*v. Welch*, 135 Vt, 316, 321-322 (1977). (breathalyzer); *State v. Fitzsimmons*, 93 Wash. 2d 436, 488 (1979) vacated and remanded, 449 U.S. 977, aff'd, 94 Wash. 2d 858 (1980) (blood alcohol content) (both Federal and State Constitutions) See *Brazelton* at 784.

What is stunning is that the aforesaid jurisdictions upheld the right to counsel before taking a breath test and did so without having statutory scheming imposing a "per se" theory of liability.

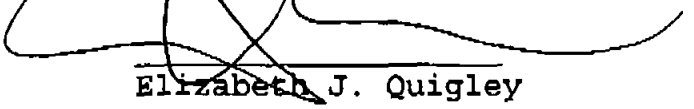
Massachusetts should reconsider *Brazelton* in light of the the "per se" theory of OUI liability as the decision to take the breath test is now a critical stage in the proceeding. The defendant should have been advised that she had the right to consult with counsel and been given reasonable access to counsel through a timely phone call.

## CONCLUSION AND REQUEST FOR RELIEF

Wherefore, the decision to take a breathalyzer test should be deemed to be a 'critical stage' in the criminal proceeding and the right to counsel should attach. The two safeguards relied upon in *Brazelton* are no longer adequate protections in light of the "per se" theory of OUI liability as the test itself provides evidence of an element of the offense.*id.*

Timothia Neary-French respectfully requests this Honorable Court find that she was denied her right to counsel at this 'critical stage' of the proceeding in violation of her of Art.12 of the Massachusetts Declaration of Rights and the Sixth and Fourteenth Amendments of the United States Constitution.

Appellant,
Timothea Neary-French
By her Attorney



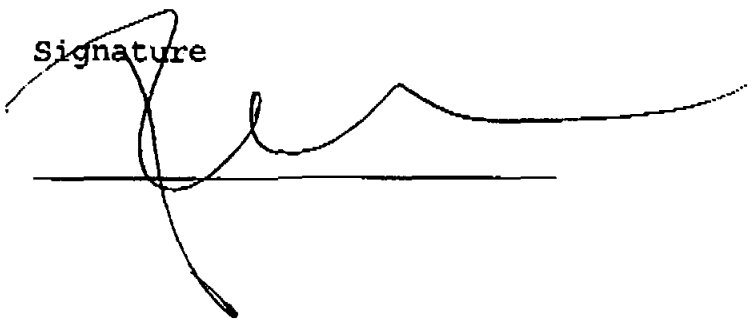
Elizabeth J. Quigley

## CERTIFICATE OF COMPLIANCE

Pursuant to Mass.R.A.P. 16(k), I hereby certify, that the foregoing brief complies with the rules of court that pertain to the format and filing of the brief and appendix.

Elizabeth J. Quigley
27 Henry Ave.
Pittsfield, Ma
01201

Signature



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**PART I** ADMINISTRATION OF THE GOVERNMENT

**TITLE XIV** PUBLIC WAYS AND WORKS

**CHAPTER 90** MOTOR VEHICLES AND AIRCRAFT

**Section 24** Driving while under influence of intoxicating liquor, etc.; second and subsequent offenses; punishment; treatment programs; reckless and unauthorized driving; failure to stop after collision

Section 24. (1) (a) (1) Whoever, upon any way or in any place to which the public has a right of access, or upon any way or in any place to which members of the public have access as invitees or licensees, operates a motor vehicle with a percentage, by weight, of alcohol in their blood of eight one-hundredths or greater, or while under the influence of intoxicating liquor, or of marijuana, narcotic drugs, depressants or stimulant substances, all as defined in section one of chapter ninety-four C, or the vapors of glue shall be punished by a fine of not less than five hundred nor more than five thousand dollars or by imprisonment for not more than two and one-half years, or both such fine and imprisonment.

There shall be an assessment of $250 against a person who is convicted of, is placed on probation for, or is granted a continuance without a finding for or otherwise pleads guilty to or admits to a finding of sufficient facts of operating a motor vehicle while under the influence of intoxicating liquor, marijuana, narcotic drugs, depressants or stimulant substances under this section; provided, however, that but $187.50 of the amount collected under this assessment shall be deposited monthly by the court with the state treasurer for who shall deposit it into the Head Injury Treatment Services Trust Fund, and the remaining amount of the assessment shall be credited to the General Fund. The assessment shall not be subject to reduction or waiver by the court for any reason.

There shall be an assessment of $50 against a person who is convicted, placed on probation or granted a continuance without a finding or who otherwise pleads guilty to or admits to a finding of sufficient facts for operating a motor vehicle while under the influence of intoxicating liquor or under the influence of marihuana, narcotic drugs, depressants or stimulant substances, all as defined by section 1 of chapter 94C, pursuant to this section or section 24D or 24E or subsection (a) or (b) of section 24G or section 24L. The assessment shall not be subject to waiver by the court for any reason. If a person against whom a fine is assessed is sentenced to a correctional facility and the assessment has not been paid, the court shall note the assessment on the mittimus. The monies collected pursuant to the fees established by this paragraph shall be transmitted monthly by the courts to the state treasurer who shall then deposit, invest and transfer the monies, from time to time, into the Victims of Drunk Driving Trust Fund established in section 66 of chapter 10. The monies shall then be administered, pursuant to said section 66 of said chapter 10, by the victim and witness assistance board for the purposes set forth in said section 66. Fees paid by an individual into the Victims of Drunk Driving

Trust Fund pursuant to this section shall be in addition to, and not in lieu of, any other fee imposed by the court pursuant to this chapter or any other chapter. The administrative office of the trial court shall file a report detailing the amount of funds imposed and collected pursuant to this section to the house and senate committees on ways and means and to the victim and witness assistance board not later than August 15 of each calendar year.

If the defendant has been previously convicted or assigned to an alcohol or controlled substance education, treatment, or rehabilitation program by a court of the commonwealth or any other jurisdiction because of a like violation preceding the date of the commission of the offense for which he has been convicted, the defendant shall be punished by a fine of not less than six hundred nor more than ten thousand dollars and by imprisonment for not less than sixty days nor more than two and one-half years; provided, however, that the sentence imposed upon such person shall not be reduced to less than thirty days, nor suspended, nor shall any such person be eligible for probation, parole, or furlough or receive any deduction from his sentence for good conduct until such person has served thirty days of such sentence; provided, further, that the commissioner of correction may, on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, or the administrator of a county correctional institution, grant to an offender committed under this subdivision a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative; to visit a critically ill relative; to obtain emergency medical or psychiatric services unavailable at said institution; to engage in employment pursuant to a work release program; or for the purposes of an aftercare program designed to support the recovery of an offender who has completed an alcohol or controlled substance education, treatment or rehabilitation program operated by the department of correction; and provided, further, that the defendant may serve all or part of such thirty day sentence to the extent such resources are available in a correctional facility specifically designated by the department of correction for the incarceration and rehabilitation of drinking drivers.

If the defendant has been previously convicted or assigned to an alcohol or controlled substance education, treatment, or rehabilitation program by a court of the commonwealth, or any other jurisdiction because of a like offense two times preceding the date of the commission of the offense for which he has been convicted, the defendant shall be punished by a fine of not less than one thousand nor more than fifteen thousand dollars and by imprisonment for not less than one hundred and eighty days nor more than two and one-half years or by a fine of not less than one thousand nor more than fifteen thousand dollars and by imprisonment in the state prison for not less than two and one-half years nor more than five years; provided, however, that the sentence imposed upon such person shall not be reduced to less than one hundred and fifty days, nor suspended, nor shall any such person be eligible for probation, parole, or furlough or receive any deduction from his sentence for good conduct until he shall have served one hundred and fifty days of such sentence; provided, further, that the commissioner of correction may, on the recommendation of the warden, superintendent, or other person in charge of a

correctional institution, or the administrator of a county correctional institution, grant to an offender committed under this subdivision a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative, to visit a critically ill relative; to obtain emergency medical or psychiatric services unavailable at said institution; to engage in employment pursuant to a work release program; or for the purposes of an aftercare program designed to support the recovery of an offender who has completed an alcohol or controlled substance education, treatment or rehabilitation program operated by the department of correction; and provided, further, that the defendant may serve all or part of such one hundred and fifty days sentence to the extent such resources are available in a correctional facility specifically designated by the department of correction for the incarceration and rehabilitation of drinking drivers.

If the defendant has been previously convicted or assigned to an alcohol or controlled substance education, treatment, or rehabilitation program by a court of the commonwealth or any other jurisdiction because of a like offense three times preceding the date of the commission of the offense for which he has been convicted the defendant shall be punished by a fine of not less than one thousand five hundred nor more than twenty-five thousand dollars and by imprisonment for not less than two years nor more than two and one-half years, or by a fine of not less than one thousand five hundred nor more than twenty-five thousand dollars and by imprisonment in the state prison for not less than two and one-half years nor more than five years; provided, however, that the sentence imposed upon such person shall not be reduced to less than twelve months, nor suspended, nor shall any such person be eligible for probation, parole, or furlough or receive any deduction from his sentence for good conduct until such person has served twelve months of such sentence; provided, further, that the commissioner of correction may, on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, or the administrator of a county correctional institution, grant to an offender committed under this subdivision a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative; to visit a critically ill relative; to obtain emergency medical or psychiatric services unavailable at said institution; to engage in employment pursuant to a work release program; or for the purposes of an aftercare program designed to support the recovery of an offender who has completed an alcohol or controlled substance education, treatment or rehabilitation program operated by the department of correction; and provided, further, that the defendant may serve all or part of such twelve months sentence to the extent that resources are available in a correctional facility specifically designated by the department of correction for the incarceration and rehabilitation of drinking drivers.

If the defendant has been previously convicted or assigned to an alcohol or controlled substance education, treatment or rehabilitation program by a court of the commonwealth or any other jurisdiction because of a like offense four or more times preceding the date of the commission of the offense for which he has been convicted, the defendant shall be punished by

a fine of not less than two thousand nor more than fifty thousand dollars and by imprisonment for not less than two and one-half years or by a fine of not less than two thousand nor more than fifty thousand dollars and by imprisonment in the state prison for not less than two and one-half years nor more than five years; provided, however, that the sentence imposed upon such person shall not be reduced to less than twenty-four months, nor suspended, nor shall any such person be eligible for probation, parole, or furlough or receive any deduction from his sentence for good conduct until he shall have served twenty-four months of such sentence; provided, further, that the commissioner of correction may, on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, or the administrator of a county correctional institution, grant to an offender committed under this subdivision a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative; to visit a critically ill relative; to obtain emergency medical or psychiatric services unavailable at said institution; to engage in employment pursuant to a work release program; or for the purposes of an aftercare program designed to support the recovery of an offender who has completed an alcohol or controlled substance education, treatment or rehabilitation program operated by the department of correction; and provided, further, that the defendant may serve all or part of such twenty-four months sentence to the extent that resources are available in a correctional facility specifically designated by the department of correction for the incarceration and rehabilitation of drinking drivers.

A prosecution commenced under the provisions of this subparagraph shall not be placed on file or continued without a finding except for dispositions under section twenty-four D. No trial shall be commenced on a complaint alleging a violation of this subparagraph, nor shall any plea be accepted on such complaint, nor shall the prosecution on such complaint be transferred to another division of the district court or to a jury-of-six session, until the court receives a report from the commissioner of probation pertaining to the defendant's record, if any, of prior convictions of such violations or of assignment to an alcohol or controlled substance education, treatment, or rehabilitation program because of a like offense; provided, however, that the provisions of this paragraph shall not justify the postponement of any such trial or of the acceptance of any such plea for more than five working days after the date of the defendant's arraignment. The commissioner of probation shall give priority to requests for such records.

At any time before the commencement of a trial or acceptance of a plea on a complaint alleging a violation of this subparagraph, the prosecutor may apply for the issuance of a new complaint pursuant to section thirty-five A of chapter two hundred and eighteen alleging a violation of this subparagraph and one or more prior like violations. If such application is made, upon motion of the prosecutor, the court shall stay further proceedings on the original complaint pending the determination of the application for the new complaint. If a new complaint is issued, the court shall dismiss the original complaint and order that further proceedings on the new complaint be postponed until the defendant has had sufficient time to prepare a defense.

If a defendant waives right to a jury trial pursuant to section twenty-six A of chapter two hundred and eighteen on a complaint under this subdivision he shall be deemed to have waived his right to a jury trial on all elements of said complaint.

(2) Except as provided in subparagraph (4) the provisions of section eighty-seven of chapter two hundred and seventy-six shall not apply to any person charged with a violation of subparagraph (1) and if said person has been convicted of or assigned to an alcohol or controlled substance education, treatment or rehabilitation program because of a like offense by a court of the commonwealth or any other jurisdiction preceding the commission of the offense with which he is charged.

(3) Notwithstanding the provisions of section six A of chapter two hundred and seventy-nine, the court may order that a defendant convicted of a violation of subparagraph (1) be imprisoned only on designated weekends, evenings or holidays; provided, however, that the provisions of this subparagraph shall apply only to a defendant who has not been convicted previously of such violation or assigned to an alcohol or controlled substance education, treatment or rehabilitation program preceding the date of the commission of the offense for which he has been convicted.

(4) Notwithstanding the provisions of subparagraphs (1) and (2), a judge, before imposing a sentence on a defendant who pleads guilty to or is found guilty of a violation of subparagraph (1) and who has not been convicted or assigned to an alcohol or controlled substance education, treatment or rehabilitation program by a court of the commonwealth or any other jurisdiction because of a like offense two or more times of the date of the commission of the offense for which he has been convicted, shall receive a report from the probation department of a copy of the defendant's driving record, the criminal record of the defendant, if any, and such information as may be available as to the defendant's use of alcohol and may, upon a written finding that appropriate and adequate treatment is available to the defendant and the defendant would benefit from such treatment and that the safety of the public would not be endangered, with the defendant's consent place a defendant on probation for two years; provided, however, that a condition for such probation shall be that the defendant be confined for no less than fourteen days in a residential alcohol treatment program and to participate in an out patient counseling program designed for such offenders as provided or sanctioned by the division of alcoholism, pursuant to regulations to be promulgated by said division in consultation with the department of correction and with the approval of the secretary of health and human services or at any other facility so sanctioned or regulated as may be established by the commonwealth or any political subdivision thereof for the purpose of alcohol or drug treatment or rehabilitation, and comply with all conditions of said residential alcohol treatment program. Such condition of probation shall specify a date before which such residential alcohol treatment program shall be attended and completed.

Failure of the defendant to comply with said conditions and any other terms of probation as

imposed under this section shall be reported forthwith to the court and proceedings under the provisions of section three of chapter two hundred and seventy-nine shall be commenced. In such proceedings, such defendant shall be taken before the court and if the court finds that he has failed to attend or complete the residential alcohol treatment program before the date specified in the conditions of probation, the court shall forthwith specify a second date before which such defendant shall attend or complete such program, and unless such defendant shows extraordinary and compelling reasons for such failure, shall forthwith sentence him to imprisonment for not less than two days; provided, however, that such sentence shall not be reduced to less than two days, nor suspended, nor shall such person be eligible for furlough or receive any reduction from his sentence for good conduct until such person has served two days of such sentence; and provided, further, that the commissioner of correction may, on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, or of the administrator of a county correctional institution, grant to an offender committed under this subdivision a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative; to visit a critically ill relative; to obtain emergency medical or psychiatric services unavailable at said institution; or to engage in employment pursuant to a work release program. If such defendant fails to attend or complete the residential alcohol treatment program before the second date specified by the court, further proceedings pursuant to said section three of said chapter two hundred and seventy-nine shall be commenced, and the court shall forthwith sentence the defendant to imprisonment for not less than thirty days as provided in subparagraph (1) for such a defendant.

The defendant shall pay for the cost of the services provided by the residential alcohol treatment program; provided, however, that no person shall be excluded from said programs for inability to pay; and provided, further, that such person files with the court, an affidavit of indigency or inability to pay and that investigation by the probation officer confirms such indigency or establishes that payment of such fee would cause a grave and serious hardship to such individual or to the family of such individual, and that the court enters a written finding thereof. In lieu of waiver of the entire amount of said fee, the court may direct such individual to make partial or installment payments of the cost of said program.

(b) A conviction of a violation of subparagraph (1) of paragraph (a) shall revoke the license or right to operate of the person so convicted unless such person has not been convicted of or assigned to an alcohol or controlled substance education, treatment or rehabilitation program because of a like offense by a court of the commonwealth or any other jurisdiction preceding the date of the commission of the offense for which he has been convicted, and said person qualifies for disposition under section twenty-four D and has consented to probation as provided for in said section twenty-four D; provided, however, that no appeal, motion for new trial or exceptions shall operate to stay the revocation of the license or the right to operate. Such revoked license shall immediately be surrendered to the prosecuting officer who shall forward the same to the registrar. The court shall report immediately any revocation, under this section,

of a license or right to operate to the registrar and to the police department of the municipality in which the defendant is domiciled. Notwithstanding the provisions of section twenty-two, the revocation, reinstatement or issuance of a license or right to operate by reason of a violation of paragraph (a) shall be controlled by the provisions of this section and sections twenty-four D and twenty-four E.

(c) (1) Where the license or right to operate has been revoked under section twenty-four D or twenty-four E, or revoked under paragraph (b) and such person has not been convicted of a like offense or has not been assigned to an alcohol or controlled substance education, treatment or rehabilitation program because of a like offense by a court of the commonwealth or any other jurisdiction preceding the date of the commission of the offense for which he has been convicted, the registrar shall not restore the license or reinstate the right to operate to such person unless the prosecution of such person has been terminated in favor of the defendant, until one year after the date of conviction; provided, however, that such person may, after the expiration of three months from the date of conviction, apply for and shall be granted a hearing before the registrar for the purpose of requesting the issuance of a new license for employment or educational purposes, which license shall be effective for not more than an identical twelve hour period every day on the grounds of hardship and a showing by the person that the causes of the present and past violations have been dealt with or brought under control, and the registrar may, in his discretion, issue such license under such terms and conditions as he deems appropriate and necessary; and provided, further, that such person may, after the expiration of six months from the date of conviction, apply for and shall be granted a hearing before the registrar for the purpose of requesting the issuance of a new license on a limited basis on the grounds of hardship and a showing by the person that the causes of the present and past violations have been dealt with or brought under control and the registrar may, in his discretion, issue such a license under such terms and conditions as he deems appropriate and necessary.

(2) Where the license or the right to operate of a person has been revoked under paragraph (b) and such person has been previously convicted of or assigned to an alcohol or controlled substance education, treatment or rehabilitation program by a court of the commonwealth or any other jurisdiction because of a like violation preceding the date of the commission of the offense for which such person has been convicted, the registrar shall not restore the license or reinstate the right to operate of such person unless the prosecution of such person has been terminated in favor of the defendant, until two years after the date of the conviction; provided, however, that such person may, after the expiration of 1 year from the date of conviction, apply for and shall be granted a hearing before the registrar for the purpose of requesting the issuance of a new license for employment or education purposes, which license shall be effective for not more than an identical twelve hour period every day on the grounds of hardship and a showing by the person that the causes of the present and past violations have been dealt with or brought under control and that such person shall have successfully completed the residential treatment program in subparagraph (4) of paragraph (a) of subdivision (1), or such treatment program

mandated by section twenty-four D, and the registrar may, in his discretion, issue such license under such terms and conditions as he deems appropriate and necessary; and provided, further, that such person may, after the expiration of 18 months from the date of conviction, apply for and shall be granted a hearing before the registrar for the purpose of requesting the issuance of a new license on a limited basis on the grounds of hardship and a showing by the person that the causes of the present and past violations have been dealt with or brought under control and the registrar may, in his discretion, issue such a license under such terms and conditions as he deems appropriate and necessary. A mandatory restriction on a hardship license granted by the registrar under this subparagraph shall be that such person have an ignition interlock device installed on each vehicle owned, each vehicle leased and each vehicle operated by the licensee for the duration of the hardship license.

(3) Where the license or right to operate of any person has been revoked under paragraph (b) and such person has been previously convicted or assigned to an alcohol or controlled substance education, treatment or rehabilitation program because of a like offense by a court of the commonwealth or any other jurisdiction two times preceding the date of the commission of the crime for which he has been convicted or where the license or right to operate has been revoked pursuant to section twenty-three due to a violation of said section due to a prior revocation under paragraph (b) or under section twenty-four D or twenty-four E, the registrar shall not restore the license or reinstate the right to operate to such person, unless the prosecution of such person has terminated in favor of the defendant, until eight years after the date of conviction; provided however, that such person may, after the expiration of two years from the date of the conviction, apply for and shall be granted a hearing before the registrar for the purpose of requesting the issuance of a new license for employment or education purposes, which license shall be effective for not more than an identical twelve hour period every day, on the grounds of hardship and a showing by the person that the causes of the present and past violations have been dealt with or brought under control and the registrar may, in his discretion, issue such license under such terms and conditions as he deems appropriate and necessary; and provided, further, that such person may, after the expiration of four years from the date of conviction, apply for and shall be granted a hearing before the registrar for the purpose of requesting the issuance of a new license on a limited basis on the grounds of hardship and a showing by the person that the causes of the present and past violations have been dealt with or brought under control and the registrar may, in his discretion, issue such a license under such terms and conditions as he deems appropriate and necessary. A mandatory restriction on a hardship license granted by the registrar under this subparagraph shall be that such person have an ignition interlock device installed on each vehicle owned, each vehicle leased and each vehicle operated by the licensee for the duration of the hardship license.

(31/2) Where the license or the right to operate of a person has been revoked under paragraph (b) and such person has been previously convicted of or assigned to an alcohol or controlled substance education, treatment or rehabilitation program by a court of the commonwealth or any

other jurisdiction because of a like violation three times preceding the date of the commission of the offense for which such person has been convicted, the registrar shall not restore the license or reinstate the right to operate of such person unless the prosecution of such person has been terminated in favor of the defendant, until ten years after the date of the conviction; provided, however, that such person may, after the expiration of five years from the date of the conviction, apply for and shall be granted a hearing before the registrar for the purpose of requesting the issuance of a new license for employment or education purposes which license shall be effective for an identical twelve hour period every day on the grounds of hardship and a showing by the person that the causes of the present and past violations have been dealt with or brought under control and the registrar may, in his discretion, issue such license under such terms and conditions as he deems appropriate and necessary; and provided, further, that such person may, after the expiration of eight years from the date of conviction, apply for and shall be granted a hearing before the registrar for the purpose of requesting the issuance of a new license on a limited basis on the grounds of hardship and a showing by the person that the causes of the present and past violations have been dealt with or brought under control and the registrar may, in his discretion, issue such a license under the terms and conditions as he deems appropriate and necessary. A mandatory restriction on a hardship license granted by the registrar under this subparagraph shall be that such person have an ignition interlock device installed on each vehicle owned, each vehicle leased and each vehicle operated by the licensee for the duration of the hardship license.

(33/4) Where the license or the right to operate of a person has been revoked under paragraph (b) and such person has been previously convicted of or assigned to an alcohol or controlled substance education, treatment or rehabilitation program by a court of the commonwealth or any other jurisdiction because of a like violation four or more times preceding the date of the commission of the offense for which such person has been convicted, such person's license or right to operate a motor vehicle shall be revoked for the life of such person, and such person shall not be granted a hearing before the registrar for the purpose of requesting the issuance of a new license on a limited basis on the grounds of hardship; provided, however, that such license shall be restored or such right to operate shall be reinstated if the prosecution of such person has been terminated in favor of such person. An aggrieved party may appeal, in accordance with the provisions of chapter thirty A, from any order of the registrar of motor vehicles under the provisions of this section.

(4) In any prosecution commenced pursuant to this section, introduction into evidence of a prior conviction or a prior finding of sufficient facts by either certified attested copies of original court papers, or certified attested copies of the defendant's biographical and informational data from records of the department of probation, any jail or house of corrections, the department of correction, or the registry, shall be prima facie evidence that the defendant before the court had been convicted previously or assigned to an alcohol or controlled substance education, treatment, or rehabilitation program by a court of the commonwealth or any other jurisdiction.

Such documentation shall be self-authenticating and admissible, after the commonwealth has established the defendant's guilt on the primary offense, as evidence in any court of the commonwealth to prove the defendant's commission of any prior convictions described therein. The commonwealth shall not be required to introduce any additional corrobating evidence, nor live witness testimony to establish the validity of such prior convictions.

(d) For the purposes of subdivision (1) of this section, a person shall be deemed to have been convicted if he pleaded guilty or nolo contendere or admits to a finding of sufficient facts or was found or adjudged guilty by a court of competent jurisdiction, whether or not he was placed on probation without sentence or under a suspended sentence or the case was placed on file, and a license may be revoked under paragraph (b) hereof notwithstanding the pendency of a prosecution upon appeal or otherwise after such a conviction. Where there has been more than one conviction in the same prosecution, the date of the first conviction shall be deemed to be the date of conviction under paragraph (c) hereof.

(e) In any prosecution for a violation of paragraph (a), evidence of the percentage, by weight, of alcohol in the defendant's blood at the time of the alleged offense, as shown by chemical test or analysis of his blood or as indicated by a chemical test or analysis of his breath, shall be admissible and deemed relevant to the determination of the question of whether such defendant was at such time under the influence of intoxicating liquor; provided, however, that if such test or analysis was made by or at the direction of a police officer, it was made with the consent of the defendant, the results thereof were made available to him upon his request and the defendant was afforded a reasonable opportunity, at his request and at his expense, to have another such test or analysis made by a person or physician selected by him; and provided, further, that blood shall not be withdrawn from any party for the purpose of such test or analysis except by a physician, registered nurse or certified medical technician. Evidence that the defendant failed or refused to consent to such test or analysis shall not be admissible against him in a civil or criminal proceeding, but shall be admissible in any action by the registrar under paragraph (f) or in any proceedings provided for in section twenty-four N. If such evidence is that such percentage was five one-hundredths or less, there shall be a permissible inference that such defendant was not under the influence of intoxicating liquor, and he shall be released from custody forthwith, but the officer who placed him under arrest shall not be liable for false arrest if such police officer had reasonable grounds to believe that the person arrested had been operating a motor vehicle upon any such way or place while under the influence of intoxicating liquor; provided, however, that in an instance where a defendant is under the age of twenty-one and such evidence is that the percentage, by weight, of alcohol in the defendant's blood is two one-hundredths or greater, the officer who placed him under arrest shall, in accordance with subparagraph (2) of paragraph (f), suspend such defendant's license or permit and take all other actions directed therein, if such evidence is that such percentage was more than five one-hundredths but less than eight one-hundredths there shall be no permissible inference. A certificate, signed and sworn to, by a chemist of the department of the state police or by a

chemist of a laboratory certified by the department of public health, which contains the results of an analysis made by such chemist of the percentage of alcohol in such blood shall be prima facie evidence of the percentage of alcohol in such blood.

(f) (1) Whoever operates a motor vehicle upon any way or in any place to which the public has right to access, or upon any way or in any place to which the public has access as invitees or licensees, shall be deemed to have consented to submit to a chemical test or analysis of his breath or blood in the event that he is arrested for operating a motor vehicle while under the influence of intoxicating liquor; provided, however, that no such person shall be deemed to have consented to a blood test unless such person has been brought for treatment to a medical facility licensed under the provisions of section 51 of chapter 111; and provided, further, that no person who is afflicted with hemophilia, diabetes or any other condition requiring the use of anticoagulants shall be deemed to have consented to a withdrawal of blood. Such test shall be administered at the direction of a police officer, as defined in section 1 of chapter 90C, having reasonable grounds to believe that the person arrested has been operating a motor vehicle upon such way or place while under the influence of intoxicating liquor. If the person arrested refuses to submit to such test or analysis, after having been informed that his license or permit to operate motor vehicles or right to operate motor vehicles in the commonwealth shall be suspended for a period of at least 180 days and up to a lifetime loss, for such refusal, no such test or analysis shall be made and he shall have his license or right to operate suspended in accordance with this paragraph for a period of 180 days; provided, however, that any person who is under the age of 21 years or who has been previously convicted of a violation under this section, subsection (a) of section 24G, operating a motor vehicle with a percentage by weight of blood alcohol of eight one-hundredths or greater, or while under the influence of intoxicating liquor in violation of subsection (b) of said section 24G, section 24L or subsection (a) of section 8 of chapter 90B, section 8A or 8B of said chapter 90B, or section 131/2 of chapter 265 or a like violation by a court of any other jurisdiction or assigned to an alcohol or controlled substance education, treatment or rehabilitation program by a court of the commonwealth or any other jurisdiction for a like offense shall have his license or right to operate suspended forthwith for a period of 3 years for such refusal; provided, further, that any person previously convicted of, or assigned to a program for, 2 such violations shall have the person's license or right to operate suspended forthwith for a period of 5 years for such refusal; and provided, further, that a person previously convicted of, or assigned to a program for, 3 or more such violations shall have the person's license or right to operate suspended forthwith for life based upon such refusal. If a person refuses to submit to any such test or analysis after having been convicted of a violation of section 24L, the registrar shall suspend his license or right to operate for 10 years. If a person refuses to submit to any such test or analysis after having been convicted of a violation of subsection (a) of section 24G, operating a motor vehicle with a percentage by weight of blood alcohol of eight one-hundredths or greater, or while under the influence of intoxicating liquor in violation of subsection (b) of said section 24G, or section 131/2 of chapter 265, the registrar shall revoke his license or right to operate for life. If a person refuses to take a test under this

paragraph, the police officer shall:

(i) immediately, on behalf of the registrar, take custody of such person's license or right to operate issued by the commonwealth;

(ii) provide to each person who refuses such test, on behalf of the registrar, a written notification of suspension in a format approved by the registrar; and

(iii) impound the vehicle being driven by the operator and arrange for the vehicle to be impounded for a period of 12 hours after the operator's refusal, with the costs for the towing, storage and maintenance of the vehicle to be borne by the operator.

The police officer before whom such refusal was made shall, within 24 hours, prepare a report of such refusal. Each report shall be made in a format approved by the registrar and shall be made under the penalties of perjury by the police officer before whom such refusal was made. Each report shall set forth the grounds for the officer's belief that the person arrested had been operating a motor vehicle on a way or place while under the influence of intoxicating liquor, and shall state that such person had refused to submit to a chemical test or analysis when requested by the officer to do so, such refusal having been witnessed by another person other than the defendant. Each report shall identify the police officer who requested the chemical test or analysis and the other person witnessing the refusal. Each report shall be sent forthwith to the registrar along with a copy of the notice of intent to suspend in a form, including electronic or otherwise, that the registrar deems appropriate. A license or right to operate which has been confiscated pursuant to this subparagraph shall be forwarded to the registrar forthwith. The report shall constitute prima facie evidence of the facts set forth therein at any administrative hearing regarding the suspension specified in this section.

The suspension of a license or right to operate shall become effective immediately upon receipt of the notification of suspension from the police officer. A suspension for a refusal of either a chemical test or analysis of breath or blood shall run consecutively and not concurrently, both as to any additional suspension periods arising from the same incident, and as to each other.

No license or right to operate shall be restored under any circumstances and no restricted or hardship permits shall be issued during the suspension period imposed by this paragraph; provided, however, that the defendant may immediately, upon the entry of a not guilty finding or dismissal of all charges under this section, section 24G, section 24L, or section 131/2 of chapter 265, and in the absence of any other alcohol related charges pending against said defendant, apply for and be immediately granted a hearing before the court which took final action on the charges for the purpose of requesting the restoration of said license. At said hearing, there shall be a rebuttable presumption that said license be restored, unless the commonwealth shall establish, by a fair preponderance of the evidence, that restoration of said license would likely

endanger the public safety. In all such instances, the court shall issue written findings of fact with its decision.

(2) If a person's blood alcohol percentage is not less than eight one-hundredths or the person is under twenty-one years of age and his blood alcohol percentage is not less than two one-hundredths, such police officer shall do the following:

(i) immediately and on behalf of the registrar take custody of such person's drivers license or permit issued by the commonwealth;

(ii) provide to each person who refuses the test, on behalf of the registrar, a written notification of suspension, in a format approved by the registrar; and

(iii) immediately report action taken under this paragraph to the registrar. Each report shall be made in a format approved by the registrar and shall be made under the penalties of perjury by the police officer. Each report shall set forth the grounds for the officer's belief that the person arrested has been operating a motor vehicle on any way or place while under the influence of intoxicating liquor and that the person's blood alcohol percentage was not less than .08 or that the person was under 21 years of age at the time of the arrest and whose blood alcohol percentage was not less than .02. The report shall indicate that the person was administered a test or analysis, that the operator administering the test or analysis was trained and certified in the administration of the test or analysis, that the test was performed in accordance with the regulations and standards promulgated by the secretary of public safety, that the equipment used for the test was regularly serviced and maintained and that the person administering the test had every reason to believe the equipment was functioning properly at the time the test was administered. Each report shall be sent forthwith to the registrar along with a copy of the notice of intent to suspend, in a form, including electronic or otherwise, that the registrar deems appropriate. A license or right to operate confiscated under this clause shall be forwarded to the registrar forthwith.

The license suspension shall become effective immediately upon receipt by the offender of the notice of intent to suspend from a police officer. The license to operate a motor vehicle shall remain suspended until the disposition of the offense for which the person is being prosecuted, but in no event shall such suspension pursuant to this subparagraph exceed 30 days.

In any instance where a defendant is under the age of twenty-one years and such evidence is that the percentage, by weight, of alcohol in the defendant's blood is two one-hundredths or greater and upon the failure of any police officer pursuant to this subparagraph, to suspend or take custody of the driver's license or permit issued by the commonwealth, and, in the absence of a complaint alleging a violation of paragraph (a) of subdivision (1) or a violation of section twenty-four G or twenty-four L, the registrar shall administratively suspend the defendant's license or right to operate a motor vehicle upon receipt of a report from the police officer who

administered such chemical test or analysis of the defendant's blood pursuant to subparagraph (1). Each such report shall be made on a form approved by the registrar and shall be sworn to under the penalties of perjury by such police officer. Each such report shall set forth the grounds for the officer's belief that the person arrested had been operating a motor vehicle on a way or place while under the influence of intoxicating liquor and that such person was under twenty-one years of age at the time of the arrest and whose blood alcohol percentage was two one-hundredths or greater. Such report shall also state that the person was administered such a test or analysis, that the operator administering the test or analysis was trained and certified in the administration of such test, that the test was performed in accordance with the regulations and standards promulgated by the secretary of public safety, that the equipment used for such test was regularly serviced and maintained, and that the person administering the test had every reason to believe that the equipment was functioning properly at the time the test was administered. Each such report shall be endorsed by the police chief as defined in section one of chapter ninety C, or by the person authorized by him, and shall be sent to the registrar along with the confiscated license or permit not later than ten days from the date that such chemical test or analysis of the defendant's blood was administered. The license to operate a motor vehicle shall thereupon be suspended in accordance with section twenty-four P.

(g) Any person whose license, permit or right to operate has been suspended under subparagraph (1) of paragraph (f) shall, within fifteen days of suspension, be entitled to a hearing before the registrar which shall be limited to the following issues: (i) did the police officer have reasonable grounds to believe that such person had been operating a motor vehicle while under the influence of intoxicating liquor upon any way or in any place to which members of the public have a right of access or upon any way to which members of the public have a right of access as invitees or licensees, (ii) was such person placed under arrest, and (iii) did such person refuse to submit to such test or analysis. If, after such hearing, the registrar finds on any one of the said issues in the negative, the registrar shall forthwith reinstate such license, permit or right to operate. The registrar shall create and preserve a record at said hearing for judicial review. Within thirty days of the issuance of the final determination by the registrar following a hearing under this paragraph, a person aggrieved by the determination shall have the right to file a petition in the district court for the judicial district in which the offense occurred for judicial review. The filing of a petition for judicial review shall not stay the revocation or suspension. The filing of a petition for judicial review shall be had as soon as possible following the submission of said request, but not later than thirty days following the submission thereof. Review by the court shall be on the record established at the hearing before the registrar. If the court finds that the department exceeded its constitutional or statutory authority, made an erroneous interpretation of the law, acted in an arbitrary and capricious manner, or made a determination which is unsupported by the evidence in the record, the court may reverse the registrar's determination.

Any person whose license or right to operate has been suspended pursuant to subparagraph (2) of paragraph (f) on the basis of chemical analysis of his breath may within ten days of such

suspension request a hearing and upon such request shall be entitled to a hearing before the court in which the underlying charges are pending or if the individual is under the age of twenty-one and there are no pending charges, in the district court having jurisdiction where the arrest occurred, which hearing shall be limited to the following issue; whether a blood test administered pursuant to paragraph (e) within a reasonable period of time after such chemical analysis of his breath, shows that the percentage, by weight, of alcohol in such person's blood was less than eight one-hundredths or, relative to such person under the age of twenty-one was less than two one-hundredths. If the court finds that such a blood test shows that such percentage was less than eight one-hundredths or, relative to such person under the age of twenty-one, that such percentage was less than two one-hundredths, the court shall restore such person's license, permit or right to operate and shall direct the prosecuting officer to forthwith notify the department of criminal justice information services and the registrar of such restoration.

(h) Any person convicted of a violation of subparagraph (1) of paragraph (a) that involves operating a motor vehicle while under the influence of marihuana, narcotic drugs, depressants or stimulant substances, all as defined in section one of chapter ninety-four C, or the vapors of glue, may, as part of the disposition in the case, be ordered to participate in a driver education program or a drug treatment or drug rehabilitation program, or any combination of said programs. The court shall set such financial and other terms for the participation of the defendant as it deems appropriate.

(2) (a) Whoever upon any way or in any place to which the public has a right of access, or any place to which members of the public have access as invitees or licensees, operates a motor vehicle recklessly, or operates such a vehicle negligently so that the lives or safety of the public might be endangered, or upon a bet or wager or in a race, or whoever operates a motor vehicle for the purpose of making a record and thereby violates any provision of section seventeen or any regulation under section eighteen, or whoever without stopping and making known his name, residence and the register number of his motor vehicle goes away after knowingly colliding with or otherwise causing injury to any other vehicle or property, or whoever loans or knowingly permits his license or learner's permit to operate motor vehicles to be used by any person, or whoever makes false statements in an application for such a license or learner's permit, or whoever knowingly makes any false statement in an application for registration of a motor vehicle or whoever while operating a motor vehicle in violation of section 8M, 12A or 13B, such violation proved beyond a reasonable doubt, is the proximate cause of injury to any other person, vehicle or property by operating said motor vehicle negligently so that the lives or safety of the public might be endangered, shall be punished by a fine of not less than twenty dollars nor more than two hundred dollars or by imprisonment for not less than two weeks nor more than two years, or both; and whoever uses a motor vehicle without authority knowing that such use is unauthorized shall, for the first offense be punished by a fine of not less than fifty dollars nor more than five hundred dollars or by imprisonment for not less than thirty days nor more than two years, or both, and for a second offense by imprisonment in the state prison for not

more than five years or in a house of correction for not less than thirty days nor more than two and one half years, or by a fine of not more than one thousand dollars, or by both such fine and imprisonment; and whoever is found guilty of a third or subsequent offense of such use without authority committed within five years of the earliest of his two most recent prior offenses shall be punished by a fine of not less than two hundred dollars nor more than one thousand dollars or by imprisonment for not less than six months nor more than two and one half years in a house of correction or for not less than two and one half years nor more than five years in the state prison or by both fine and imprisonment. A summons may be issued instead of a warrant for arrest upon a complaint for a violation of any provision of this paragraph if in the judgment of the court or justice receiving the complaint there is reason to believe that the defendant will appear upon a summons.

*[ Second paragraph of paragraph (a) of subdivision (2) effective until March 1, 2014. For text effective March 1, 2014, see below.]*

There shall be an assessment of $250 against a person who, by a court of the commonwealth, is convicted of, is placed on probation for or is granted a continuance without a finding for or otherwise pleads guilty to or admits to a finding of sufficient facts of operating a motor vehicle negligently so that the lives or safety of the public might be endangered under this section, but $187.50 of the $250 collected under this assessment shall be deposited monthly by the court with the state treasurer, who shall deposit it in the Head Injury Treatment Services Trust Fund, and the remaining amount of the assessment shall be credited to the General Fund. The assessment shall not be subject to reduction or waiver by the court for any reason.

*[ Second paragraph of paragraph (a) of subdivision (2) as amended by 2013, 38, Sec. 80 effective March 1, 2014. See 2013, 38, Sec. 214. For text effective until March 1, 2014, see above.]*

There shall be an assessment of $250 against a person who, by a court of the commonwealth, is convicted of, is placed on probation for or is granted a continuance without a finding for or otherwise pleads guilty to or admits to a finding of sufficient facts of operating a motor vehicle negligently so that the lives or safety of the public might be endangered under this section, but $250 of the $250 collected under this assessment shall be deposited monthly by the court with the state treasurer, who shall deposit it in the Head Injury Treatment Services Trust Fund, and the remaining amount of the assessment shall be credited to the General Fund. The assessment shall not be subject to reduction or waiver by the court for any reason.

(a1/2) (1) Whoever operates a motor vehicle upon any way or in any place to which the public has right of access, or upon any way or in any place to which members of the public shall have access as invitees or licensees, and without stopping and making known his name, residence and the registration number of his motor vehicle, goes away after knowingly colliding with or otherwise causing injury to any person not resulting in the death of any person, shall be

punished by imprisonment for not less than six months nor more than two years and by a fine of not less than five hundred dollars nor more than one thousand dollars.

(2) Whoever operates a motor vehicle upon any way or in any place to which the public has a right of access or upon any way or in any place to which members of the public shall have access as invitees or licensees and without stopping and making known his name, residence and the registration number of his motor vehicle, goes away to avoid prosecution or evade apprehension after knowingly colliding with or otherwise causing injury to any person shall, if the injuries result in the death of a person, be punished by imprisonment in the state prison for not less than two and one-half years nor more than ten years and by a fine of not less than one thousand dollars nor more than five thousand dollars or by imprisonment in a jail or house of correction for not less than one year nor more than two and one-half years and by a fine of not less than one thousand dollars nor more than five thousand dollars. The sentence imposed upon such person shall not be reduced to less than one year, nor suspended, nor shall any person convicted under this paragraph be eligible for probation, parole, or furlough or receive any deduction from his sentence until such person has served at least one year of such sentence; provided, however, that the commissioner of correction may on the recommendation of the warden, superintendent or other person in charge of a correctional institution, or the administrator of a county correctional institution, grant to an offender committed under this paragraph, a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative; to visit a critically ill relative; to obtain emergency medical or psychiatric services unavailable at said institution or to engage in employment pursuant to a work release program.

(3) Prosecutions commenced under subparagraph (1) or (2) shall not be continued without a finding nor placed on file.

(b) A conviction of a violation of paragraph (a) or paragraph (a1/2) of subdivision (2) of this section shall be reported forthwith by the court or magistrate to the registrar, who may in any event, and shall unless the court or magistrate recommends otherwise, revoke immediately the license or right to operate of the person so convicted, and no appeal, motion for new trial or exceptions shall operate to stay the revocation of the license or right to operate. If it appears by the records of the registrar that the person so convicted is the owner of a motor vehicle or has exclusive control of any motor vehicle as a manufacturer or dealer or otherwise, the registrar may revoke the certificate of registration of any or all motor vehicles so owned or exclusively controlled.

(c) The registrar, after having revoked the license or right to operate of any person under paragraph (b), in his discretion may issue a new license or reinstate the right to operate to him, if the prosecution has terminated in favor of the defendant. In addition, the registrar may, after an investigation or upon hearing, issue a new license or reinstate the right to operate to a person convicted in any court for a violation of any provision of paragraph (a) or (a1/2) of subdivision

(2); provided, however, that no new license or right to operate shall be issued by the registrar to: (i) any person convicted of a violation of subparagraph (1) of paragraph (a1/2) until one year after the date of revocation following his conviction if for a first offense, or until two years after the date of revocation following any subsequent conviction; (ii) any person convicted of a violation of subparagraph (2) of paragraph (a1/2) until three years after the date of revocation following his conviction if for a first offense or until ten years after the date of revocation following any subsequent conviction; (iii) any person convicted, under paragraph (a) of using a motor vehicle knowing that such use is unauthorized, until one year after the date of revocation following his conviction if for a first offense or until three years after the date of revocation following any subsequent conviction; and (iv) any person convicted of any other provision of paragraph (a) until sixty days after the date of his original conviction if for a first offense or one year after the date of revocation following any subsequent conviction within a period of three years. Notwithstanding the forgoing, a person holding a junior operator's license who is convicted of operating a motor vehicle recklessly or negligently under paragraph (a) shall not be eligible for license reinstatement until 180 days after the date of his original conviction for a first offense or 1 year after the date of revocation following a subsequent conviction within a period of 3 years. The registrar, after investigation, may at any time rescind the revocation of a license or right to operate revoked because of a conviction of operating a motor vehicle upon any way or in any place to which the public has a right of access or any place to which members of the public have access as invitees or licensees negligently so that the lives or safety of the public might be endangered. The provisions of this paragraph shall apply in the same manner to juveniles adjudicated under the provisions of section fifty-eight B of chapter one hundred and nineteen.

(3) The prosecution of any person for the violation of any provision of this section, if a subsequent offence, shall not, unless the interests of justice require such disposition, be placed on file or otherwise disposed of except by trial, judgment and sentence according to the regular course of criminal proceedings; and such a prosecution shall be otherwise disposed of only on motion in writing stating specifically the reasons therefor and verified by affidavits if facts are relied upon. If the court or magistrate certifies in writing that he is satisfied that the reasons relied upon are sufficient and that the interests of justice require the allowance of the motion, the motion shall be allowed and the certificate shall be filed in the case. A copy of the motion and certificate shall be sent by the court or magistrate forthwith to the registrar.

(4) In any prosecution commenced pursuant to this section, introduction into evidence of a prior conviction or prior finding of sufficient facts by either original court papers or certified attested copy of original court papers, accompanied by a certified attested copy of the biographical and informational data from official probation office records, shall be prima facie evidence that a defendant has been convicted previously or assigned to an alcohol or controlled substance education, treatment, or rehabilitation program because of a like offense by a court of the commonwealth one or more times preceding the date of commission of the offense for which

said defendant is being prosecuted.

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| **PART IV** CRIMES, PUNISHMENTS AND PROCEEDINGS IN CRIMINAL CASES |
| **TITLE II** PROCEEDINGS IN CRIMINAL CASES |
| **CHAPTER 276** SEARCH WARRANTS, REWARDS, FUGITIVES FROM JUSTICE, ARREST, EXAMINATION, COMMITMENT AND BAIL, PROBATION OFFICERS AND BOARD OF PROBATION |
| **Section 33A** Use of telephone in places of detention |

Section 33A. The police official in charge of the station or other place of detention having a telephone wherein a person is held in custody, shall permit the use of the telephone, at the expense of the arrested person, for the purpose of allowing the arrested person to communicate with his family or friends, or to arrange for release on bail, or to engage the services of an attorney. Any such person shall be informed forthwith upon his arrival at such station or place of detention, of his right to so use the telephone, and such use shall be permitted within one hour thereafter.

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| **PART IV** CRIMES, PUNISHMENTS AND PROCEEDINGS IN CRIMINAL CASES |
| **TITLE I** CRIMES AND PUNISHMENTS |
| **CHAPTER 263** RIGHTS OF PERSONS ACCUSED OF CRIME |
| **Section 5A** Driving while intoxicated; right to medical examination; notice |

Section 5A. A person held in custody at a police station or other place of detention, charged with operating a motor vehicle while under the influence of intoxicating liquor, shall have the right, at his request and at his expense, to be examined immediately by a physician selected by him. The police official in charge of such station or place of detention, or his designee, shall inform him of such right immediately upon being booked, and shall afford him a reasonable opportunity to exercise it. Such person shall, immediately upon being booked, be given a copy of this section unless such a copy is posted in the police station or other place of detention in a conspicuous place to which such person has access.

Article XII. No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defense by himself, or his council at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury. [See Amendments, Art. XLVIII, The Initiative, II, sec. 2.]

# Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

# Amendment XIV

## Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## Section 2.

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male (/constitution/amendmentxix) inhabitants of such state, being twenty-one years of age (/constitution/amendmentxxvi), and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

## Section 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

## Section 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

## Section 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.